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In the Supreme Court of the United States

OCTOBER TERM, 1959

LEE WAN NAM a/k/a/ HONG LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A; R. 76-80[1]) is reported at 274 F. 2d 863.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1960 (R. 81). The petition for a writ of certiorari was filed on March 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R." designates the appendices to the briefs below, on file with the Clerk of this Court. The original trial transcript ("T.") is being filed herewith.

QUESTIONS PRESENTED

1. Whether petitioner, who was admittedly not the victim of the search of May Moy's apartment, nor convicted as a result of the heroin there seized, can complain of that search and seizure or of the admission of the narcotics seized from the apartment.

2. Whether the trial judge abused his discretion in not directing a mental examination of government witness Tom Tung.

STATEMENT

On February 27, 1958, a three count indictment was returned in the District Court for the Southern District of New York. Count one charged petitioner and Sheck Hom with a substantive narcotic offense involving approximately 11 grains of heroin, in violation of 21 U.S.C. 174 (R. 1, 4); count 2 charged May Moy with a substantive narcotic violation involving about 17 ounces, 337 grains of heroin (R. 5); and count 3 charged that petitioner, May Moy and Sheck Hom engaged in a narcotics conspiracy from about February 1, 1958, until the date of the return of the indictment (R. 4-6). During the course of the trial, a judgment of acquittal was granted as to May Moy with respect to the charge set forth in count 2, and she was dismissed as a co-conspirator in count 3 (R. 2, 17-18, T. 608, 630-631).[2] The jury

[2] This judgment of acquittal stemmed from the trial court's grant, at the commencement of the trial, of May Moy's motion to suppress the 17 ounces 337 grains of heroin obtained upon a search of her apartment (R. 10).

acquitted Sheck Hom, and acquitted petitioner on count 3, but convicted him on count 1 (R. 68-69, T. 1184-1185). He was sentenced to 5 years imprisonment on that count (R. 7-8, T. 1201 A). The court of appeals unanimously affirmed his conviction. 274 F. 2d 863. The pertinent facts adduced by the government are these:

1. Pursuant to pre-arrangement, on the night of February 5, 1958, petitioner and Sheck Hom met with government narcotic agent Milton Wu in an automobile at Mulberry and Bayard Streets, New York (T. 68-69). Agent Wu, who was introduced as a narcotics purchaser, told petitioner that he wanted to buy half a kilo of heroin. Petitioner said he could obtain it for him for $6,600 (T. 70). Wu then requested that he be shown a sample of the heroin and that if the quality proved satisfactory he would pay the purchase price in advance (T. 70-71). Petitioner left the automobile, and while under surveillance by other narcotic agents was seen to meet with May Moy (T. 76, 232-235, 298-300). After their meeting in the recess of a store front, petitioner left and returned to Mott and Bayard Streets (T. 304-306). This was approximately 12:30 a.m. (T. 77-78). He entered the automobile and handed Wu a small cellophane wrapped package which he said was the sample (T. 78). Wu left the car, field tested the contents, and found that they contained narcotics (T. 80). He then returned and placed petitioner and Sheck Hom under arrest (T. 81). Subsequent analysis revealed that this sample contained a 68.9% heroin content

(T. 393-395). This transaction was the basis of the charge in count 1, and was alleged as one of the overt acts in the conspiracy count (R. 4, 6).

After her meeting with petitioner, May Moy was followed by federal narcotic agents, and seen to enter the premises at 87 Clinton Street, New York (T. 234-235, 301). Following petitioner's arrest by Agent Wu, he was brought to the outside of that building and there told the agents in which apartment May Moy resided (T. 239-240). Agents Ward and Fitzgerald entered the apartment, arrested May Moy, and seized some 17 ounces, 337 grains of heroin (T. 871-872).

2. The evidence of narcotics found in May Moy's apartment was suppressed as to her.[3] After the order of suppression, the government in its case in chief sought to introduce the seized heroin limited to petitioner. The court excluded it on the ground that, since May Moy was still in the case, admission of the narcotics would be "highly prejudicial to her" (R. 73, T. 264-269). At the close of the government's case, May Moy was acquitted by the court (R. 73, T. 608, 630-631). Subsequently, after the close of the defendants' case, the court permitted the intro-

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[3] At the first trial on this indictment in November 1958, Judge Palmieri excluded this seized contraband as to May Moy on the ground that the mode of entry was violative of the rule announced in *Miller* v. *United States*, 357 U.S. 301. Following the order of suppression, a mistrial was declared as to all the defendants because a government witness had volunteered a statement touching upon the material suppressed. Relying upon Judge Palmieri's ruling, Judge Weinfeld also ordered the seized heroin suppressed as to May Moy in the trial below (R. 9-10).

duction of the seized heroin, noting that government counsel had indicated to him that through inadvertence and the pressure of trial he had overlooked moving to reopen his direct case after May Moy's acquittal. The court's view was "that no prejudice can come to the defendants" by its admission at this time (R. 74, T. 864).

ARGUMENT

1. Petitioner argues that the heroin suppressed as to May Moy should also have been suppressed as to him, despite the fact that he was not the victim of the search and seizure (Pet. 5-11). But the heroin seized from May Moy's apartment was relevant only to the conspiracy count upon which the jury acquitted petitioner. Proof on count 1, the only count upon which he was convicted, consisted of direct evidence that he transferred contraband heroin to narcotic agent Wu (see the Statement, *supra*, pp 3-4).

In any event, petitioner's claim is fully answered by this Court's recent decision in *Jones* v. *United States*, 362 U.S. 257. While the Court did liberalize the "standing" rule by holding that the narrow technical concepts of property law should not "be determinative in fashioning procedures ultimately referable to constitutional safeguards" (362 U.S. at 266), it did not discredit, but rather reaffirmed, the basic doctrine that only one aggrieved by a search and seizure has a right to complain of it. See 362 U.S. at 260-1.

Petitioner does not assert, nor does the record indicate, that he was a victim of a search and seizure,

under the *Jones* standard. He claims no interest in the narcotics seized nor in the premises searched, and he was not on the premises when the search occurred. In actuality, petitioner is simply "'one who claims prejudice only through the use of evidence gathered as a consequence of a search [and] seizure directed at someone else", and as such has no standing to complain. *Jones*, 362 U.S. at 261.[4]

Nor is this the kind of illicit-possession narcotics case in which the assertion by the defendant of a possessory interest would have been to admit guilt of the crime charged. Petitioner was not convicted as a result of a presumption arising from his connection with the seized heroin. On the contrary, he was convicted on direct evidence showing a violation of 21 U.S.C. 174, occurring prior to the time of the seizure and involving different heroin.[5]

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[4] Petitioner's reliance upon *McDonald* v. *United States*, 335 U.S. 451, is misplaced. In that case McDonald and Washington had been arrested in McDonald's apartment, and certain papers and adding machines were seized. Finding that these items, belonging to McDonald, had been unlawfully seized and that if, as they should have been, they had been returned to him they would not have been available against Washington at trial, the Court reversed the conviction of both defendants (335 U.S. at 456).

In this case, the subject of the seizure was contraband which was not returnable to May Moy despite the illegality of the search and seizure. Second, unlike Washington who was actually present on the premises when the search and seizure occurred and thus would have met the standing test adopted in *Jones*, petitioner was not present at May Moy's apartment when the seizure took place, and, as we have shown, has no standing at all.

[5] Similarly without merit is the order-of-proof argument (Pet. 12-14). As the trial court observed, the only reason

2. Petitioner also contends that the trial court abused its discretion in refusing to order a mental examination of government witness Tom Tung (Pet. 14-15). In denying the request, the trial court pointed out that the defense had an opportunity to apply for a mental examination after an interview with the witness the previous June and had failed to do so. He then stated (R. 19-20, T. 984-985):

> * * * I hold that this application, coming at the tail end of the trial, when the Government is in its rebuttal case, is made entirely late, and further, that there is no warrant for it.
>
> * * * *
>
> * * * As far as I have been able to observe * * * it seemed to me he has been able to comprehend and answer every question that was put to him. Some questions may not have been immediately responsive, but some of this is probably due to language difficulty. * * *
>
> In my observation, I see no justification for the request, and accordingly, it is denied.

As the court below observed, whether or not to order a mental examination of a witness is a matter "pe-

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that the government introduced the seized contraband on rebuttal, and not by reopening its direct case after May Moy's acquittal, was because of inadvertence. The court properly ruled that no prejudice would result from such introduction during rebuttal. (R. 73-74; T. 863-865). The court of appeals correctly held that resolution of the order of proof is precisely the kind of issue within the discretion of the trial judge (Pet. 19). See *United States* v. *Tannuzzo*, 174 F. 2d 177, 181 (C.A. 2), certiorari denied, 338 U.S. 815; *Carrado* v. *United States*, 210 F. 2d 712, 721 (C.A. D.C.), certiorari denied, 350 U.S. 938.

culiarly within the discretion of the trial court." It held that on the facts of this case such discretion was not abused (Pet. 18). There is no occasion for this Court to review that finding.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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